APPENDIX

DISTRICT COURT'S FINDINGS OF FACT (R. 43-48):

1. At the time this action was commenced plaintiff was a citizen and resident of the State of Kansas and ever since has been, and defendant was and ever since has been a resident of the State of Illinois, owning and operating lines of railroad in and through Douglas County, Nebraska. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

2. Plaintiff was first employed by defendant as a student-helper at defendant's station at McDonald, Kansas, on August 1, 1899, by an oral contract of employment which does not appear to have been for any definite or stated length of time or duration. Plaintiff was promoted to telegraph operator in 1900, and to station agent in 1902, and continued to work for defendant from the time of his first employment until October 5th, 1932. From 1913 to October 5th, 1932, plaintiff's employment was as station agent and telegraph operator at defendant's station in Oberlin, Decatur County, Kansas.

3. Since 1907 plaintiff has at all times been a member of the Order of Railroad Telegraphers, which is an association or labor union of employees working as telegraph operators and station agents, among other occupations, (fol. 45) on lines of railroad. The defendant and the Order of Railroad Telegraphers entered into a written agreement or contract on October 1st, 1927, prescribing rules and rates of pay for telegraphers, agents, and certain other employees not material here, and said agreement has been in effect since October 1st, 1927. Plaintiff was not individually a party to said agreement. Said agreement provided that an employee's seniority rights

dated from the last time of entering the service and extended over each division superintendent's district, and in the event of discipline or unjust treatment an employee should have certain hearings and appeals to the officials of the defendant, a letter stating the cause of discipline and a transcript of the evidence taken at the investigation. Said agreement further provided that if the final decision decreed that the charges against an employee were not sustained, his record should be cleared and if dismissed, he should be returned to his former position and paid for all time lost.

4. On October 5th, 1932, plaintiff was discharged by defendant upon the grounds that he had violated the defendant's rule of its operating Department prohibiting the use of intoxicants, conduct unbecoming an employee occupying a responsible position, and absenting himself from duty without permission, on September 9th and 10th, 1932. Plaintiff was given a letter from defendant's division superintendent stating the foregoing grounds for his dismissal and a transcript of the evidence taken at an investigation held by the division superintendent on September 16th, 1932.

5. Subsequent to plaintiff's discharge on October 5th, 1932, plaintiff made various demands and requests personally and through the officers of the Order of Railroad Telegraphers to (verious) officers of defendant for further hearings and for reinstatement in the employment of defendant, which demands and requests were not granted by defendant.

6. Plaintiff was never reinstated in his employment by defendant after his discharge on October 5th, 1932, and has never been in the service of or employed by defendant

since his said discharge, and plaintiff's employment by defendant was finally terminated on that date, and the relationship of master and servant has never existed between defendant and plaintiff since (them).

7. On January 25th, 1934, plaintiff brought an action (fol. 46) in which he was plaintiff and the defendant here was defendant, in the District Court of Decatur County, Kansas, for damages for injury in obtaining other employment, loss of wages and earnings and for injuries to his good name and the pursuit of his occupation and employment resulting from his alleged wrongful discharge on October 5th, 1932, the refusal of defendant to reinstate him in his employment all in alleged violation of the agreement between defendant and the Order of Railroad Telegraphers, and from an alleged conspiracy between certain of defendant's officers to discharge plaintiff. Said action for damages was tried in October, 1936 and on February 11th, 1937, a judgment for plaintiff in the sum of $500.00 was entered in favor of and with the consent of plaintiff, on the general verdict of the jury and special questions submitted to the jury wherein the jury allowed the sum of $500.00 to plaintiff as damages for loss of plaintiff's seniority rights. On February 11th, 1937 the said judgment was paid by defendant and received by plaintiff who discharged said judgment of record, and no appeal was taken from said judgment and it became final.

8. In said action in the District Court of Decatur County, Kansas, the plaintiff treated his contract of employment by defendant as finally terminated and at an end, and sued for all damages both past and future resulting from the alleged breach of plaintiff's contract or contracts of employment and his discharge from his em-

ployment. The District Court of Decatur County, Kansas, had jurisdiction of the parties to and the subject matter of said action wherein the parties were the same and the contracts of employment and alleged breach thereof are the same as in the case at bar.

9. During September, 1937, the Order of Railroad Telegraphers as the representative of plaintiff and on behalf of plaintiff, filed a claim with the Third Division of the National Railroad Adjustment Board under the Railway Labor Act, demanding that the Adjustment Board require defendant to reinstate plaintiff to his position of agent-telegrapher at Oberlin, Kansas, from which he had been discharged on October 5th, 1932 and reimburse him for all monetary loss sustained. Said claim was based upon the alleged wrongful discharge of plaintiff and refusal to reinstate him in alleged violation of plaintiff's contracts of employment, including said agreement between defendant (fol. 47) and the Order of Railroad Telegraphers. Defendant had due notice of said claim and appeared and defended against same. The claims, contentions, evidence and arguments of plaintiff and defendant were fully presented to the Adjustment Board in accordance with its rules. After full hearing of said claim of plaintiff the Third Division of said Board was unable to reach a decision and the National Mediation Board appointed a Referee to sit with said Third Division of the Board on plaintiff's said claim before the Board. The said Referee held further hearing on plaintiff's claim, in which plaintiff and defendant participated, and on April 7th, 1938, said Third (Divisioh) of the Board entered its decision or Award dismissing plaintiff's claim.

10. The said Adjustment Board in its Award dismissing plaintiff's said claim before the Board found that

plaintiff had recovered damages for loss of his seniority rights in the aforesaid action for damages in the District Court of Decatur County, Kansas, and concluded that plaintiff's action in the District Court of Decatur County, Kansas, was indivisible, that plaintiff there had made an election of remedies, recovered judgment which had been satisfied, that his claim before the Board was barred and that plaintiff could not recover for loss of his seniority—that which entitled him to position—and then recover the position also. The said Adjustment Board had jurisdiction of the parties and of the subject matter of the plaintiff's said claim presented to the Board.

11. In May, 1938 plaintiff filed a Motion for Rehearing of his claim with the National Railroad Adjustment Board, which motion was denied by the Board. In November, 1941, plaintiff filed a Notice of, or a Supplemental Petition with said Adjustment Board asking the Board to grant him the same relief as demanded in his claim presented to said Adjustment Board in September, 1937, and which was dismissed by said Board.

12. In January, 1940 plaintiff commenced an action in the nature of mandamus in the District Court of the United States for the District of Kansas, wherein he was plaintiff and the United States on the relation of its District Attorney for Kansas, and the members of the Third Division of the National Railroad Adjustment Board, were defendants. The object and purpose of said action (fol. 48) was to compel the said Adjustment Board to hear and determine the claims of plaintiff against defendant. That action was dismissed by the court in April, 1940. In April, 1941, plaintiff commenced another action in the nature of mandamus in the District Court of the United States for the District of Kansas, wherein he was

plaintiff, and the United States on relation of its District Attorney for Kansas and the members of the Third Division of the National Railroad Adjustment Board, were defendants, the object and purpose of said action being to compel the said Board to hear and determine the claim of plaintiff against defendant for reinstatement to his employment and payment of his monetary loss resulting from his alleged wrongful discharge. Said last mentioned action was by the court dismissed by judgment entered July 10th, 1941. On appeal taken by plaintiff to the United States Circuit Court of Appeals, Tenth Circuit, the said judgment of dismissal was affirmed and certiorari was (thereofter) denied by the United States Supreme Court. The defendant was not a party in any way to the said actions commenced by plaintiff in the District Court of the United States for the District of Kansas.

13. This action was commenced in this Court more than ten years after the discharge of plaintiff by defendant in alleged breach of plaintiff's contracts of employment, and after the death of the division superintendent of defendant who was plaintiff's superior officer and who discharged plaintiff.

DISTRICT COURT'S CONCLUSIONS OF LAW (R. 48-49) WITH CITATIONS OF AUTHORITIES.

(fol. 49):

1. The Court has jurisdiction of the parties and the subject matter of this cause.

2. Plaintiff is without a claim upon which any relief can be granted.

3. The judgment and payment thereof, in plaintiff's action in the District Court of Decatur County, Kansas, is res adjudicata of all the issues, including damages, in this cause and is a bar to plaintiff's claim.

(Baron v. Kurn, 349 Mo. 1202, 164 S. W. (2d) 310; McIntosh v. Wiggins (C. C. A. 8), 123 Fed. (2d) 316; Arnold v. Masonic Country Club, 268 Mich. 430, 256 N. W. 472; Madden v. Smith, 28 Kan. 798; Price v. First National Bank, 62 Kan. 735, 64 Pac. 637; Ransome Concrete Machinery Co. v. Moody (C. C. A. 2), 282 Fed. 29; Snell v. Turner Lumber Co. (C. C. A. 2), 285 Fed. 356; Runyan v. Great Lakes Dredge & Dock Co. (C. C. A. 6), 141 Fed. (2d) 396; Pierce v. Tennessee Coal, Iron & Railroad Co., 173 U. S. 1; James v. Board of Commissioners of Allen County, 44 Ohio St. 226, 6 N. E. 246.)

4. The Award of the Third Division of the National Railroad Adjustment Board dismissing plaintiff's claim before it is final and binding and constitutes a bar to plaintiff's claims in this cause.

(Railway Labor Act, 48 Stat. 1185, Sec. 3, First (m); Title 45, U. S. C. A., Sec. 153, First (m); Berryman v. Pullman Co. (D. C., W. D. Mo.), 48 Fed. Supp. 542; Austin v. Southern Pacific Co., 50 Cal. App. (2d) 292, 123 Pac. (2d) 39; Railroad Yardmasters of North America v. Pittsburgh & L. E. R. Co. (D. C., N. D. Ohio), 39 Fed. Supp. 876.)

5. The prosecution of plaintiff's action in the District Court of Decatur County, Kansas, to a judgment in plaintiff's favor and payment of that judgment to plaintiff, was an election of remedies which is a bar to plaintiff's claims in this cause, and plaintiff is thereby estopped to demand reinstatement to his employment.

(Slaughter v. La Compagnie Francaises Des Cables Telegraphiques (C. C. A. 2), 119 Fed. 588;

Sweet v. Montpelier Sav. Bank & Trust Co., 69 Kan. 641, 77 Pac. 538; Carr v. Arnold, 239 Ill. 37, 87 N. E. 870; Muir v. Morris (C. C. A. 9), 268 Fed. 97; Gentry v. Bearss, 88 Neb. 742, 130 N. W. 428.)

6. Plaintiff is not entitled to have specific performance of his contract of employment in this Court.

(Beatty v. Chicago, Burlington & Quincy R. Co., 49 Wyo. 22, 52 Pac. (2d) 404; Burke v. Union Pacific R. Co. (C. C. A. 10), 129 Fed. (2d) 844; Moore v. Illinois Central R. Co., 312 U. S. 630; Mosshamer, et al., v. Wabash Ry. Co., 221 Mich. 407, 191 N. W. 210; Chambers, et al., v. Davis, et al., 128 Miss. 613, 91 So. 346; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (Cir. Ct., Ohio), 54 Fed. 730; Fiedler, Inc., v. Coast Finance Co., 129 N. J. Eq. 161, 18 Atl. (2d) 268.)

7. Plaintiff's cause of action is barred by the statute of limitations and by laches.

(Moore v. Illinois Central R. Co., 312 U. S. 630; General Statutes, Kansas, 1935, Sec. 60-306, First; Compiled Statutes, Nebraska, Sec. 20-205; Baron v. Kurn, 349 Mo. 1202, 164 S. W. (2d) 310; Barry v. Detroit Terminal R. Co., 307 Mich. 226, 11 N. W. (2d) 867; Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051; Barnhart v. Western Maryland Ry. Co. (C. C. A. 4), 128 Fed. (2d) 709; Kunz v. Colnon (D. C., Kans.), 54 Fed. Supp. 673; Illinois Central R. Co. v. Moore (C. C. A. 5), 112 Fed. (2d) 959; Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342.)

8. The actions commenced and prosecuted by plaintiff in the District Court of the United States for the District of Kansas are not material to any of the issues in this cause.

9. This action should be dismissed at plaintiff's costs and defendant should recover judgment against plaintiff for costs incurred by defendant.

STATE CONSTITUTION, KANSAS, Art. 3, Sec. 1:

> "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law; and all courts of record shall have a seal to be used in the authentication of all process."

Art. 3, Sec. 6:

> "The district courts shall have such jurisdiction in their respective districts as may be provided by law."

GENERAL STATUTES, KANSAS, 1935, Sec. 20-301:

> "There shall be in each county organized for judicial purposes a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses."

GENERAL STATUTES, KANSAS, 1935, Sec. 60-306, First:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> *First*: Within five years: An action upon any agreement, contract or promise in writing."

COMPILED STATUTES, NEBRASKA, 1929, Sec. 20-201:

"Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued."

Sec. 20-205:

"Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment."